LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
AUG 30 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957.

No. 284

GEORGE J. SCHAEFER,

Petitioner,

vs.

MILTON L. GUNZBURG, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

GUY KNUPP,
6399 Wilshire Boulevard,
Los Angeles 48, California,
Attorney for Respondents.

ARTHUR GROMAN,
Of Counsel.

SUBJECT INDEX

PAGE

Opinions below 1

Jurisdiction 2

Question presented 2

Provisions of the Constitution, statutes, and federal rules involved 2

Statement 3

Argument 8

The petitioner was not entitled to a jury trial where he sought various kinds of equitable relief based on an alleged oral partnership and where his only claim for damages was incidental to such equitable relief 8

I.

The decision of the Court of Appeals is correct in the holding that the case involved a suit in equity, and that no jury trial was required 8

II.

There is no conflict in the decisions of the Courts of Appeals, nor is there any other basis for granting certiorari 14

III.

Petitioner by amending his complaint after the trial court's ruling denying him a trial by jury, by repeating his assertion that he had no adequate remedy at law in his amended complaint, by omitting therefrom a demand for a jury trial, and by proceeding to trial to the court without objection, consented to trial by the court without a jury 18

Conclusion 19

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Baltimore & Caroline Line, Inc. v. Redman, 295 U. S. 654	8
Barton v. Barbour, 104 U. S. 126	8, 11
Bowie v. Sorrell, 209 F. 2d 49	17
Bruckman v. Hollzer, 153 F. 2d 730	17
Camp v. Boyd, 229 U. S. 530	10
Dimick v. Schiedt, 293 U. S. 474	8
Dukes v. Kellogg, 127 Cal. 563	15
Gulbenkian v. Gulbenkian, 147 F. 2d 173	16
Johnson v. Gardner, 179 F. 2d 114; cert. den., 339 U. S. 935	8, 17
Johnstone v. Morris, 210 Cal. 580, 292 Pac. 970	11
Kirby v. Lake Shore, etc. R. R. Co., 120 U. S. 130	15
Laughlin v. Haberfelde, 72 Cal. App. 2d 780, 165 P. 2d 544	12, 13
Leimer v. Woods, 196 F. 2d 828	16
McGowan v. Parish, 237 U. S. 285	10
National L. R. Bd. v. Jones and Laughlin Steel Corp., 301 U. S. 1	11
Ring v. Spina, 166 F. 2d 546	14, 15
Shields v. Thomas (U. S.), 18 How. 253	11
Smith v. Cushman Motor Works, 178 F. 2d 953	18
Tanimura v. United States, 195 F. 2d 329	17
United States v. Louisiana, 339 U. S. 699	11, 13
Zimmerman v. Harding, 227 U. S. 489	12

RULES

Federal Rules of Civil Procedure, Rule 38(a)	3, 11
Federal Rules of Civil Procedure, Rule 39(a)	3, 11

STATUTES

United States Code, Title 28, Sec. 1254	2
United States Code, Title 28, Sec. 2111	3
United States Constitution, Seventh Amendment	2

TEXTBOOK

5 Moore's Federal Practice, Sec. 38.19(2) pp. 169-170	10

IN THE

Supreme Court of the United States

October Term, 1957.

No. 284

GEORGE J. SCHAEFER,

Petitioner,

vs.

MILTON L. GUNZBURG, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

Opinions Below.

The memorandum opinion of the District Court [R. 99-100], its Findings of Fact [R. 100-109], and Judgment [R. 110-111] are not officially reported. The opinion of the United States Court of Appeals for the Ninth Circuit, unanimously affirming the judgment below, has not yet been officially reported, but appears in the record at pages 1825-1832, and is also set forth in the Appendix (1-10) of the Petition for a Writ of Certiorari.[1]

[1] Hereinafter abbreviated as "Pet." or "Pet. App."

Jurisdiction.

The judgment of the Court of Appeals was entered April 26, 1957 [R. 1825-1832]. The petition for a writ of certiorari was filed on July 16, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

Question Presented.

Petitioner filed a complaint in the United States District Court in which he requested an accounting of the profits of an alleged oral partnership. The body of the complaint contained no allegation of damages. The complaint, asserting that "Plaintiff does not have any adequate remedy at law", requested numerous, specific forms of equitable relief, and asked for damages only as an incident to this relief.

The question is whether the Court of Appeals correctly held that the cause of action was basically equitable in its nature, so that the trial court, in passing on the plaintiff's various claims for equitable relief, was not required to submit to a jury the preliminary question of whether a partnership did exist.

Provisions of the Constitution, Statutes, and Federal Rules Involved.

The pertinent provisions of the Constitution of the United States, the Statutes, and the Federal Rules of Civil Procedure are as follows:

United States Constitution, Amendment VII:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

28 U. S. C., Sec. 2111:

"On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

Federal Rules of Civil Procedure, Rule 38(a):

"The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate."

Federal Rules of Civil Procedure, Rule 39(a):

"When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States."

Statement.

In October, 1953, petitioner filed a complaint in which he alleged the formation of an oral partnership agreement, the violation of petitioner's rights thereunder by respondent Milton L. Gunzburg, and asked that it be adjudged that:

1. Petitioner was a partner [R. 34]:

2. Petitioner owned half of the stock of certain corporations and that various respondents be directed

to surrender the stock certificates to him and that new certificates be issued in his name [R. 34];

3. The partnership be dissolved [R. 36];

4. The corporations be dissolved [R. 36, 37];

5. The assets and effects of the partnership and the corporations be sold [R. 37];

6. The respondent, Milton L. Gunzburg, and the other respondents account to petitioner for all assets and profits of the alleged partnership, and be declared trustees *ex maleficio* [R. 37];

7. Respondents restore and pay over to the partnership all assets and profits allegedly diverted by them [R. 37, 38];

8. The debts of the partnership be paid, and that thereafter the profits and properties be divided equally between petitioner and respondent, Milton L. Gunzburg [R. 38];

9. Respondent, Milton L. Gunzburg, pay damages of $3,500,000.00 to petitioner, together with interest [R. 38, 39];

10. *Pendente lite*, and permanently, all respondents be enjoined from receiving the assets or profits of the partnership and from conducting any business activity [R. 39];

11. *Pendente lite*, and thereafter, a receiver be appointed to receive all the assets and profits of the partnership and the various corporations [R. 39].

The last paragraph of the body of the complaint preceding the prayer read as follows: "Forty-Fourth: Plaintiff does not have any adequate remedy at law." [R. 34.] The complaint concluded with a demand for a jury trial.

Respondents promptly moved to strike the demand for a jury trial on the ground the complaint stated a claim for an accounting of partnership profits and other relief cognizable in equity. The motion was granted by the trial judge on March 5, *1954*, after a full hearing [R. 55-57].

On March 7, *1955*, petitioner filed an Amended Complaint which changed some of the allegations of fact from those set forth in the original complaint and which added a common count for work, labor and services [R. 58-66]. The Amended Complaint again averred that "Plaintiff has no adequate remedy at law.", and did *not* contain a demand for a jury trial [R. 64].

Petitioner proceeded to trial on the Amended Complaint, to the court alone, without making any objection, oral or written [Pet. App. 10; R. 1832].

The trial court, after a full trial of the issues on the merits, concluded, among other things, that no partnership agreement ever existed, and found in favor of the respondents and against the petitioner [R. 100-111].

On appeal, petitioner did not challenge the court's findings.[2] The opinion of the Court of Appeals notes this stipulation by petitioner [Pet. App. 1; R. 1825].

The facts established at the trial were:

Respondent, Milton L. Gunzburg, a motion picture writer, at great personal expense and through his full time efforts over a period of months prior to March, 1951, organized and developed all the elements, including photo-

---

[2]Petitioner's Opening Brief before the Court of Appeals, page 9: "On this appeal, it is not contended that evidence is insufficient to support the pertinent Findings of Fact or that such Findings of Fact are clearly erroneous."

graphy and projection, of the first commercially feasible system of full length, three dimension, motion picture production and exhibition [R. 1200-1225].

In March of 1951, Milton L. Gunzburg met petitioner, who functioned in the motion picture industry as a producer's representative. Petitioner represented to Gunzburg that he could assist him in securing production of, or financing for, a picture which Gunzburg wished to produce in his three dimension system, which he had named Natural Vision [R. 1327-1329].

Despite some effort on his part, petitioner was completely unable to secure financing for Gunzburg or to induce anyone else to make a picture in Gunzburg's process [Findings of Fact, Par. VII, R. 103-104; and see R. 358].

In the meantime Gunzburg, through his own efforts, met an independent producer (unacquainted with petitioner) who contracted to, and did, produce a full length motion picture using Gunzburg's system [R. 303, 1362]. The picture, called BWANA DEVIL, was released in November of 1952, and became an immediate success.

During the years 1951, 1952 and 1953 petitioner was engaged in various business enterprises of his own. [R. 499-500]. He never:—contributed any capital to Gunzburg's Natural Vision enterprise; had any direction of its management; negotiated any contracts on its behalf; hired or fired any help; or shared in any profits or losses, or in any way engaged in any partnership activities [R. 411-415].

Petitioner made no note or memo of his alleged partnership agreement with Gunzburg [R. 292-296]; and, although over a period of three years he engaged in correspondence with Gunzburg, petitioner never made the

slightest reference to a partnership [R. 292-296], nor did he refer to partnership losses or earnings in any of his income tax returns filed during the three year period [R. 414]. Despite his allegation that he made an oral partnership agreement with Gunzburg in April of 1951, petitioner never made any claim upon Gunzburg until March of 1953 [R. 403-409].

Though claiming to be Gunzburg's partner, petitioner, according to his own testimony, arranged to furnish competitors of Gunzburg with a list of theatres needing equipment that Gunzburg sold [R. 470-472]. Aware that one of Gunzburg's principal activities was the selling of Polaroid viewers, nevertheless petitioner conducted active negotiations for the purpose of going into the business of selling Polaroid viewers in competition with Gunzburg [R. 449-452]. Further, while acting as agent *to sell* the motion picture BWANA DEVIL in which Gunzburg had a 20% interest, petitioner secretly negotiated to join with United Artists Corporation in *buying* the picture [R. 673].

In his memorandum opinion below, the Trial Court concluded as follows:

> "I have placed little credence upon the testimony of the plaintiff. It is my view that he attempted through this action to obtain something to which he was not entitled." [R. 100.]

The Court of Appeals, affirming the District Court, rejected petitioner's contention that he had been erroneously deprived of a trial by jury in violation of the provisions of the Seventh Amendment to the Consitution of the United States. It held, instead, that petitioner had pleaded an equitable cause of action, on which he was not entitled to a trial by jury under principles long established by this Court [Pet. App. 2, 10; R. 1826, 1832].

ARGUMENT.

The Petitioner Was Not Entitled to a Jury Trial Where He Sought Various Kinds of Equitable Relief Based on an Alleged Oral Partnership and Where His Only Claim for Damages Was Incidental to Such Equitable Relief.

I.

The Decision of the Court of Appeals Is Correct in the Holding That the Case Involved a Suit in Equity and That No Jury Trial Was Required.

The Seventh Amendment to the Constitution preserves the right to trial by jury only as it existed "in suits at common law" at the time the Amendment was adopted. (*Dimick v. Schiedt*, 293 U. S. 474, 476; *Baltimore & Carolina Line, Inc. v. Redman*, 295 U. S. 654, 657.)

The right to a trial by jury, of course, does not obtain in a suit where traditionally courts of equity possessed and exercised jurisdiction. (*Barton v. Barbour*, 104 U. S. 126, 133-134; *Johnson v. Gardner* (C. A. 9th), 179 F. 2d 114, certiorari denied, 339 U. S. 935.)

The Court below, applying well settled principles, properly concluded that the complaint here [R. 3-40] "contained only the elements of a bill in chancery and that the trial court was correct in denying trial by jury." [Pet. App. 10; R. 1832.]

In deciding that the case was one within the traditional jurisdiction of a court of equity, the Court of Appeals, as did the trial court, analyzed the complaint. It concluded that whether the body of the complaint was examined without the prayer for relief, or whether the complaint was examined as a whole, the same conclusion would be required, *i.e.*, petitioner had

"pleaded a bill in chancery, in which all damages could be assessed and traditionally have been assessed by the chancellor as an incident to the equitable remedy." [Pet. App. 8; R. 1830.]

Petitioner, by inaccurately representing the contents of his complaint has attempted to make it appear that this is a case in which coordinate legal and equitable causes of action were contained in his complaint. He then argues, upon the basis of this unwarranted construction of his complaint, that he was improperly deprived of a jury trial on his *alleged* legal cause of action by the trial court's action in first trying to itself the equitable phases of the complaint.

There is no need to consider *representations* as to the true nature of the complaint, for it is set forth in full in pp. 3 to 40 of the Record, and its prayer is summarized in the statement of the case, *supra*, and in the opinion of the Court of Appeals, below [Pet. App. 5, 6; R. 1828]. A reading of the complaint clearly discloses it to be, generally and specifically, an equitable action for an accounting for partnership profits and for various other forms of equitable relief, to wit: the physical conveyance of stock certificates; the dissolution of a partnership; the dissolution of corporations; the impressment of trusts *ex maleficio;* the appointment of receivers; and temporary and permanent injunctions against dealing in the alleged partnership assets or in participating in the alleged partnership business [R. 34-40].

Out of seventeen specific prayers, sixteen are for equitable relief; only one asks for a monetary judgment [R. 34-40]. In the *body* of the complaint there *is no refer-*

ence whatsoever to monetary damages [R. 3-34]. Further, the complaint specifically recites "Plaintiff does not have any adequate remedy at law." [R. 34.]

An examination of the complaint shows that the one reference in the prayer to damages does not create a separate or coordinate legal claim for damages, but is merely the traditional request for damages incidental to an equity complaint, sought as an alternative if the equitable relief claimed, for any reason, is not available. (*Camp v. Boyd*, 229 U. S. 530, 551, 552; *McGowan v. Parish*, 237 U. S. 285, 296; 5 *Moore's Federal Practice*, Sec. 38.19 (2) pp. 169-170.)[2]

Petitioner has cited no case, and, indeed, he can cite none, that holds that where the damages sought in a complaint are incidental to the equitable relief, plaintiff is entitled to a jury trial. Indeed, this Court on several occasions, has affirmed the basic principle that the right of trial by jury under the Seventh Amendment has no application to cases where recovery of money damages is an

---

[2]The Court of Appeals summarized the complaint as follows [Pet. App. 3-4; R. 1827]: "The body of the complaint pleads the existence of a partnership between Schaefer and Gunzburg. It sets up the acquisition of certain properties, rights and various assets, tangible and intangible, to be held for the benefit of the alleged partnership. It is pleaded in the form and style of a code bill in equity. It complains, partially by positive allegations but generally on information and belief, of violation of rights of plaintiff. But the whole tenor of the document is to treat the alleged partnership as a continuing and going concern where one of the partners is concealing and secreting the assets and acquisitions from the other. Specifically, the body of the complaint contains no allegation that breach of the partnership relation 'caused damage to plaintiff in the sum of $3,500,000.00.' Such an allegation is the traditional and accepted earmark of an action at law. It is alleged in the body of the complaint, 'Forty-fourth: Plaintiff does not have any adequate remedy at law,' which is the traditional and accepted earmark of a suit in equity."

incident to equitable relief even though damages might have been recovered in an action at law. See: *National L. R. Ed. v. Jones and Laughlin Steel Corp.*, 301 U. S. 1, at 48 and cases cited therein. In this connection, quite obviously, it must be concluded that there is no basis for petitioner's suggestion that the question here involved has not heretofore been passed upon by this Court (Pet. 25).[4]

Petitioner attempts to raise a separte coordinate legal cause of action by seeking to bring his complaint with cases which constitute an *exception* to the general rule that the remedy of one partner against another lies in equity by way of an accounting (Pet. 11-20). See *Johnstone v. Morris*, 210 Cal. 580, 583-584; 292 Pac. 970, 972, for a statement by the California Supreme Court of the general rule.

The flaw in his position is that while under *special* circumstances, and by exact pleading, one partner *may* proceed against another in an action in law for damages, in the instant case petitioner did not plead an action in law for damages, but instead he used in almost classic chancery form the traditional language of one partner seeking an accounting and other equitable relief from another.[5]

---

[4]Petitioner has not claimed (nor can he find cases that would sustain such a claim) that Rules 38(a); and 39(a) of the Federal Rules of Civil Procedure purport in anyway to change the law laid down by this Court in *Shields v. Thomas* (U. S.), 18 How. 253, 262; *Barton v. Barbour*, 104 U. S. 126, 133, 134; and *United States v. Louisiana*, 339 U. S. 699, 706, that the Seventh Amendment applies only to actions at common law and not to suits in equity.

[5]Petitioner's characterization in his Petition, of his complaint as stating a claim at law for wrongful repudiation of a partnership (Pet. 11) must be treated with some reserve in view of his assertion in his Opening Brief below that it was a complaint for a breach of a contract to pay 50% of the profits of a business in

Zimmerman v. Harding, 227 U. S. 489 cited by petitioner (Pet. 12, 17, 22, 31) actually involved a bill in equity to obtain a decree of dissolution an accounting of partnership affairs, and the appointment of a receiver. The holding of this Court was an affirmance of the equity decree below. No question of trial by jury was raised. At issue was the doctrine of election of remedies. It is difficult to see wherein this opinion offers comfort to petitioner, since the pleadings therein— *which were concededly equitable*—parallel the pleadings here, *i.e.*, both complaints sought a dissolution, an accounting of partnership affairs, and the appointment of a receiver. In addition, and *a fortiori*, the complaint here also asked for further equitable relief, injunctions, the transfer of specific property, and the impressment of trusts.

In *Laughlin v. Haberfelde*, 72 Cal. App. 2d 780, 165 P. 2d 544, on which petitioner relies and which he cites three times (Pet. 12, 13, 15), the plaintiff did not sue for *partnership* profits, as petitioner asserts; instead, the plaintiff sued for profits that he would have made had a

---

return for personal services (Pet. Op. Br. before Ct. of App. 1, 22-23). This lack of precision has extended to petitioner's consideration of the opinion below.

In various instances petitioner has misstated the holding and position of the Court of Appeals. Weigh his charge that the Court of Appeals made no efforts to determine whether legal as well as equitable claims were pleaded (Pet. 8) against the Court's express consideration of this argument [Pet. App. 3-9; R. 1827-1831]. Note petitioner's implication that the Court of Appeals is lacking in concern for the right of trial by jury (Pet. 37-38) in the light of the Court of Appeals' declaration [Pet. App. 7; R. 1830]: "This Court is firmly committed to the doctrine that the constitutional right to jury trial should not be eroded by the flow of decisions giving force to dubious waivers and rationalized construction of the Federal Rules of Civil Procedure."

certain contract been performed . . . 783-784). The Court in *Haberfelde* concluded at page 790:

> "In a very real sense, the acts of which the appellant complains were not acts 'with respect to partnership transactions.' While the formation of the partnership furnished the opportunity, the acts constituting the tort were entirely outside of and apart from the partnership business."

Contrast this with the instant pleading wherein petitioner's every allegation concerns partnership activities [R. 8-25]; where he requests an accounting of partnership profits and assets [R. 37]; where he asks for a dissolution of the partnership, appointment of receivers, the issuance of an injunction [R. 36-39]; and where he makes no reference whatsoever in the body of his complaint to damages.

This Court has clearly indicated that an examination of the complaint, such as was made by the Courts below, is the proper method for determining whether or not a pleader is entitled to a jury trial. See: *United States v. Louisiana*, 339 U. S. 699 at 706, wherein this Court stated:

> "Louisiana's motion for a jury trial is denied. We need not examine it beyond noting that this is an equity action for an injunction and accounting. The Seventh Amendment and the statute, assuming they extend to cases under our original jurisdiction, are applicable only to actions of law. See: *Shields v. Thomas* (U. S.) 18 How 253, 262, 15 L. Ed. 368, 372; *Barton v. Barbour*, 104 U. S. 126, 133, 134, 26 L. Ed. 672, 676, 677."

It follows that the decision below is correct in its holding that there was no right to a jury trial.

II.

There Is No Conflict in the Decisions of the Courts of Appeals, nor Is There Any Other Basis for Granting Certiorari.

Petitioner, in an attempt to state a basis for the exercise of this Court's discretionary review on certiorari, asserts that the decision below is in conflict with the decisions of three circuits. However, analysis of the cases relied upon by petitioner will make it evident that no such conflict exists and that the views of the court below are fully harmonious with the decisions of other courts of appeals, as well as with the decisions of this Court.

In *Ring v. Spina*, (C. A. 2d) 166 F. 2d 546 (Pet. 24-25, 28), far from differing from the position of the Ninth Circuit below, the Court of Appeals for the Second Circuit employed exactly the same guide posts in determining whether or not the plaintiff there was entitled to a jury trial. The Court held that the question of the right to a jury trial must be decided upon the allegations of the complaint (p. 549). It noted that in the *body* of the complaint, there involved, the allegations stressed financial damage and concluded:

> "These various allegations stressing financial damage, together with the absence of any stress or even mention of equitable rights or remedies, stamp the complaint proper as basically one for legal damages." (p. 549.)

The court then turned to the prayer for indication of the pleader's intent, and found that under the particular pleading involved, the prayer stressed claims for money dam-

ages and made only one reference to equitable relief. The court concluded that the complaint "basically" was one for legal damages (p. 549).

Here as demonstrated in Argument I, above the situation is the converse of that in *Ring v. Spina*. Further the fact that in the instant case the prayer for damages is only *incidental* to the basic *equitable* action is illustrated by the request in the complaint that "after payment of the partnership debts and liabilities" the properties and profits be divided equally [R. 38, par. 13]. This, together with the allegations in the body of the complaint pertaining to a balancing of expenditures by the alleged partners [R. 10], demonstrates that it would be necessary to have an extensive accounting to ascertain all the debts of the partnership, to determine profits or losses, and to balance expenditures before it could be ascertained whether or not petitioner had anything at all coming to him. Thus, if the alleged partnership operated at a loss, or if the respective expenditures were out of balance, it might well result that petitioner had nothing coming to him. *Dukes v. Kellogg*, 127 Cal. 563 at 564. See also *Kirby v. Lake Shore, etc. R. R. Co.*, 120 U. S. 130, 134, in which this Court held that the mere existence of complicated accounts between the parties was sufficient to confer equitable jurisdiction.

Thus, *Ring v. Spina, supra*, presents no conflict with the decision of the Court of Appeals below. Upon the basis of completely different factual allegations and prayer, it concluded that the complaint there involved was basically a complaint for damages and that, thereunder, the plain-

tiff was entitled to a trial by jury. The court below, construing the altogether different allegations of the complaint filed in this case, reached an opposite conclusion concerning the relief being sought."

These divergent holdings ensue, not because these courts entertain different views concerning the fundamental right to a jury trial, but only because the two cases involve completely different pleadings. Further, the concurrence of the Second Circuit with the legal position taken by the Court of Appeals for the Ninth Circuit in the instant case is demonstrated by its decision in *Gulbenkian v. Gulbenkian* (C. A. 2d), 147 F. 2d 173, wherein it stated:

> "But we regard this as a case where the chancellor in ancient equity would have awarded damages if he did not decree specific performance, and hence no jury trial was ever claimable." (p. 176.)

The second case relied upon by petitioner to demonstrate a conflict in the circuits, *Leimer v. Woods* (C. A. 8th), 196 F. 2d 828 (Pet. 25, 27-28, 33, 35), on analysis, has no bearing on the actual pleadings involved here. In *Leimer*, upon the particular phrasing of the body of the complaint and prayer (which complaint was in no way comparable to the complaint involved here), the Court of Appeals for the Eighth Circuit found that there had been a joinder of coordinate equitable and legal causes of action, and that some of such causes of action involved common controlling issues of fact.[8]

[8] Further, in *Leimer v. Woods, supra* (834, 836), the Court stated that under circumstances where there were equitable and legal causes of action joined, the trial court, in the exercise of its discretion and under special reasons for impelling considerations, might try the equitable causes first, even though the holding there might be decisive of the entire case.

The third case cited by petitioner, *Boeing v. Sorrell* (C. A. 4th) 209 F. 2d 49 (Pet. 25, 258) has nothing whatsoever to do with the instant situation. It deals with the issue of whether or not a plaintiff in a tort action was entitled to a jury in a *separate* trial on the issue of the validity of a release.

Petitioner attempts to suggest that there is some inconsistency in the holdings of the Court of Appeals of the Ninth Circuit (Pet. 26, 27). This argument is unfounded. The pleading here is completely different from that involved in *Brackman v. Hollzer* (C. A. 9th), 152 F. 2d 730. This is illustrated by the observations of the Court of Appeals, below, [Pet. App. 3, f.n. 3; R. 1827, f.n. 3] in the instant case and in *Brackman v. Hollzer*, 152 Fed. 730, 731, f.n. 3. Further, the opinion of the Court of Appeals in this case, is completely consistent with its opinion in *Johnson v. Gardner*, 179 F. 2d 114, 117, in which case this Court denied certiorari, 339 U. S. 935.

See also the opinion of the Court of Appeals in *Tanimura v. United States* (C. A. 9th) 195 F. 2d 329.

III.

Petitioner by Amending His Complaint After the Trial Court's Ruling Denying Him a Trial by Jury, by Repeating His Assertion That He Had No Adequate Remedy at Law in His Amended Complaint, by Omitting Therefrom a Demand for a Jury Trial, and by Proceeding to Trial to the Court Without Objection, Consented to Trial by the Court Without a Jury.

Apart from the consideration that, on the particular pleading herein involved, the decision below was correctly decided, it is submitted that petitioner, by his conduct with respect to his amended complaint, acquiesced in the District Court's ruling.

The Court of Appeals in its opinion below [Pet. App. 9, 10; R. 1832] points out that a year after the trial court had segregated the issues for trial and struck the demand for a jury trial, petitioner filed an amended complaint in which he again alleged that he had no adequate remedy at law. He did not renew his demand for a jury. He proceeded to trial, to the court, on the segregated issues without objection.

In the light of these circumstances, the Court of Appeals stated that petitioner had led his opponents and the trial judge to believe that he had acquiesced in the interpretation placed by the Trial Court upon his pleading [Pet. App. 10; R. 1832].

In a similar situation the Court of Appeals for the Eighth Circuit held that the failure of a party to object to a ruling of the trial court, segregating certain issues for trial to the court, amounted to a consent to trial by the court. *Smith v. Cushman Motor Works* (C. A. 8th) 178 F. 2d 953, 954.

Conclusion.

The decision below is correct. No claim has been made that the result reached on the facts was unjust. There is no conflict in the decisions. No other reasons appear which would warrant further review. The petition for a writ of certiorari should be denied.

Respectfully submitted.

GUY KNUPP,

Attorney for Respondents.

ARTHUR GROMAN,

Of Counsel.